Calendar No. 367

98TH CONGRESS *1st Session*	SENATE	REPORT No. 98-221

FREEDOM OF INFORMATION REFORM ACT

REPORT

OF THE

Committee on the Judiciary
United States Senate

ON

S. 774

SEPTEMBER 12, 1983.—Ordered to be printed

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98TH CONGRESS
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SENATE

REPORT
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FREEDOM OF INFORMATION REFORM ACT

SEPTEMBER 12, 1983.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 774, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 774) to amend title V, United States Code, section 552, commonly called the Freedom of Information Act, to provide protective confidentiality for certain law enforcement, private business, and sensitive personal records and for other purposes, having considered the same, reports favorably thereon and recommends that the bill as amended do pass.

INTRODUCTION

Two years ago the Senate Judiciary Committee undertook the most exhaustive examination of the Freedom of Information Act (FOIA) in its history. In the intervening period, now spanning two Congresses, the Committee has held nine hearings and entertained over sixty expert witnesses with the goal of drafting a bill that will improve the Act without compromising its mission of providing our citizenry with a tool to learn about federal government activities. S. 774 and its predecessor, S. 1730 in the 97th Congress, each received the unanimous approval of this Committee as an indication of the success of the bill in amending FOIA's most glaring weaknesses without compromising its vital strengths. In short, this bill will serve to fine-tune the most important component of our nation's information policy, a policy which distinguishes the United States among other nations.

During the Committee's comprehensive oversight of FOIA, the witnesses expressed a warm appreciation for the policy of open government conveyed by FOIA. The witnesses also produced evidence,

however, that FOIA has not always operated to produce a more effective government. In many of those areas, the Committee has attempted to correct the weakness while maintaining the beneficial policy.

A major aspect of these hearings was the Committee's concern that the confidentiality of informants and sensitive law enforcement investigations is jeopardized by FOIA disclosures. The Attorney General's 1981 Task Force on Violent Crime found that FOIA should be amended because it is used by lawbreakers "to evade criminal investigation or to retaliate against informants." In addition, five different studies [1] concluded that the Act has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations. The Committee is also concerned about evidence that the Act has slowed the flow of confidential information to the law enforcement community for that reason.

It is also clear that some submitters of confidential information are fearful of losing valuable trade secrets as a result of FOIA releases to competitors. Statutory procedures to protect submitters are designed to alleviate this problem.

In addition, the extensive Committee hearings revealed other aspects of FOIA in need of fine-tuning. As mentioned earlier, the costs of the Act to the taxpayer suggest that those who directly benefit by requesting information should readily accept the responsibility of paying the cost of producing the information, subject, of course, to an adequate waiver policy for requests made in the public interest. The government agencies' inability to comply with the Act's short time limits recommends a more workable time schedule for complying with requests in the event of a backlog of requests or other "unusual circumstances." On the other hand, agencies should have appropriate incentives to comply with the time limits for the bulk of all requests.

Revising the Act's second exemption to provide adequate protection for law enforcement manuals and instructions to investigators, auditors, or negotiators, was another aspect of the testimony. Removing important limitations on the exemption designed to guarantee personal privacy also emerged as an aspect of FOIA reform. New exemptions to protect "technical data" (predominantly national security information) that may not be lawfully exported without a license and to protect Secret Service records were featured as subjects worthy of the protection currently given other information covered under the current exemptions.

The hearings also noted the need to reconsider the factors governing current determinations of types of information that may be released because they are "reasonably segregable" from classified or exempt portions of certain sensitive records.

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[1] General Accounting Office, *Impact of the Freedom of Information Act on Law Enforcement Agencies* (1978); *Report of the Attorney General's Task Force on Violent Crime* (1981); Department of Treasury, *Management Review on the Performance of the U.S. Department of Treasury in Connection with the March 30, 1981, Assassination Attempt on President Ronald Reagan* (1981); Department of Justice, Drug Enforcement Administration, *Effect of the Freedom of Information Act on DEA Investigations* (1982); Statements of Director William Webster, *Hearings on Freedom of Information;* "The Erosion of Law Enforcement Intelligence and the Impact on the Public Security," Subcommittee on Criminal Laws, Senate Judiciary Committee, 95th Congress, 2nd Sess. (1978).

Another item covered was the appropriateness of requests from certain classes of requesters, including aliens, imprisoned felons, or parties in litigation with the government who have access to information via the alternative route of discovery under the Federal Rules of Civil Procedure. Finally compiling a list of statutes which trigger withholding under Exemption 3 also emerged as an important aspect of FOIA reform. These matters each became an element of the bill approved by the Judiciary Committee unanimously.

This bill enjoys broad bipartisan support and reflects the accumulated wisdom of many diverse interests, including media representatives, public interest groups, the Reagan Administration, members of the business community, and law enforcement agencies. The FOIA Reform Act has been widely hailed as a reasonable and worthwhile compromise by these diverse and often divergent interests because it achieves the dual goals we set when embarking upon improving the Act.

Namely, the bill eliminates many of the current problems of the Act without weakening its effectiveness as a valuable means of keeping the public informed about government activities. As The Washington Post accurately noted:

> It is quintessentially American to believe that the people control the government and that they have a right to know what the government is doing. The Judiciary Committee Bill preserves that right (Washington Post, May 25, 1982, page A16).

Indeed, this right is preserved, and concomitantly the public is better served by the enhancements to the Act which are included in this bill.

No one questions the obvious virtues of an open government; nor should anyone question the government's obligation to protect the identities of confidential informants. No one questions the value of an informed citizenry; nor should anyone question the government's obligation to respect the privacy of those same citizens. No one questions the merits of a free information policy; nor should anyone question the need to protect business trade secrets.

S. 774 is a substantial step toward restoring the balance between public access to government information and efficient execution of necessary, and occasionally confidential, government functions. This bill achieves this balance in a manner that preserves both goals of the Act: a more informed citizenry and a responsible and effective government.

History of Committee Action

97th Congress

The Subcommittee on the Constitution of the Senate Committee on the Judiciary had referred to it during the 97th Congress six bills to amend the Freedom of Information Act: S. 586 and S. 587 (introduced by Senator Hatch), S. 1235 (introduced by Senator D'Amato), S. 1247 (introduced by Senator Dole), S. 1730 (introduced by Senator Hatch), and S. 1751 (introduced by Senator Hatch).

During the first session of the 97th Congress, the Subcommittee held seven days of hearings on the Freedom of Information Act from July 15, 1981 through December 9, 1981. Appearing before the Subcommittee were the following witnesses: On July 15, the Subcommittee took testimony from Robert L. Saloschin, of Lerch, Early & Roseman; William Taft, General Counsel, Department of Defense; Steven R. Dornfeld, Washington Correspondent for Knight-Ridder Newspapers and National Secretary, representing the Society of Professional Journalists, Sigma Delta Chi, accompanied by Ted Capener, Vice President of News & Public Affairs, Bonneville Broadcasting Corporation, and Bruce Sanford, of Baker Hostetler; and Jonathan C. Rose, Assistant Attorney General of the Office of Legal Policy, Department of Justice, accompanied by Judge Charles B. Renfrew, former Deputy Attorney General.

On July 22, the Subcommittee heard James T. O'Reilly, Senior Counsel for Procter & Gamble Company; Burt A. Braverman, of Cole, Raywid & Braverman; Jack I. Pulley, Senior Attorney for Dow Corning Corporation; Nancy Duff Campbell, National Women's Law Center; David C. Vladeck, Staff Attorney, Public Citizen Litigation Group; Arthur R. Whale, General Patent Counsel and Assistant Secretary, Eli Lilly and Company; Prospere S. Virden, Jr., Senior Counsel, Honeywell, Inc.; and Dr. Stuart Bondurant, Dean, School of Medicine, University of North Carolina, accompanied by Joseph A. Keyes, Staff Counsel, Association of American Medical Colleges.

On July 31, the subcommittee heard Robert R. Burke, Assistant Director of the U.S. Secret Service; James Wieghart, American Society of Newspaper Editors; Katherine A. Meyer, Director, Freedom of Information Clearinghouse; Robert Nesoff, national representative for Federal Criminal Investigators Association; and Vince McGolderick, chairman of the National Legislative Committee of the Fraternal Order of Police, accompanied by Anthony J. Morris, lieutenant of the Investigative Services Division, Metropolitan Police Department, Washington, D.C.

On September 24, the Subcommittee took testimony from U.S. Senator Alfonse M. D'Amato of New York; William J. Casey, Director of the Central Intelligence Agency, accompanied by Ernest Mayerfeld, Deputy General Counsel of the CIA; Morton H. Halperin and Allan Robert Adler, Center for National Security Studies; and Ann Caracristi, Deputy Director of the National Security Agency, accompanied by James Hudel, Legislative Counsel, National Security Agency.

On October 15, the Subcommittee heard Jonathan C. Rose, Assistant Attorney General of the Office of Legal Policy, Department of Justice; Roger Milgrim of Milgrim, Thomajan, Jacobs & Lee, Paul L. Perito, representing Advanced Health Systems, Inc., and Raleigh Hills Hospitals; David M. Worthen, M.D., Assistant Chief Medical Director for Academic Affairs of the Veterans Administration; Jerald Jacobs, representing the American Intra-Ocular Implant Society and Intra-Ocular Lens Manufacturers Association; Jack Landau, Director of the Reporters Committee for Freedom of the Press, accompanied by Tonda Rush, Director of the Freedom of Information Service Center; Bruce Rich, General Counsel of the As-

sociation of American Publishers; and Joan Hoff-Wilson, Director of the Organization of American Historians.

On November 12, the Subcommittee took testimony from Jean Otto representing the Society of Professional Journalists, Sigma Delta Chi; Charles Rowe, representing the American Newspaper Publishers Association; Edward Cony, representing the American Society of Newspaper Editors; Ernie Ford, representing the Society of Professional Journalists, Sigma Delta Chi; William H. Webster, Director of the Federal Bureau of Investigation; Morton H. Halperin, representing the American Civil Liberties Union, and Cornish F. Hitchcock, of the Freedom of Information Clearinghouse; Professor Anna K. Nelson of the Organization of American Historians; and Professor Antonin Scalia, School of Law, University of Chicago.

On December 9, the Subcommittee invited the members of the Judiciary Committee to join them for a hearing. Director William Casey of the CIA and Director William H. Webster of the FBI testified at this hearing.

In addition, the Subcommittee received a large number of written statements from other interested individuals and organizations that will become part of the permanent record of these hearings. Senator Orrin G. Hatch of Utah, Chairman of the Subcommittee on the Constitution, chaired the hearings of the Subcommittee.

On December 14, 1981, the Subcommittee on the Constitution met in executive session to consider legislation to amend the Freedom of Information Act. S. 1730, introduced by Senator Hatch, was reported out of Subcommittee by a 3-2 vote.

On May 20, 1982, the full Judiciary Committee took up S. 1730. Senator Orrin G. Hatch offered a substitute amendment for S. 1730 consisting of 17 sections. This substitute was the product of discussions between Senators Hatch, Leahy, DeConcini, and other Senators. This amendment, containing major substantive changes in many of the sections, was cosponsored by Senators Grassley, DeConcini, and Leahy. After opening statements by each of these principals, the Committee accepted the substitute amendment. The motion to favorably report the bill carried unanimously, 17-0, on a rollcall vote.

98TH CONGRESS

During the 98th Congress, the subcommittee has held hearings on three bills to amend the Freedom of Information Act: S. 774 (introduced by Senator Hatch), S. 409 (introduced by Senator Nunn), and S. 1034 (introduced by Senator Leahy).

During the first session of the 98th Congress, the Subcommittee held two days of hearings, April 18, 1983 and April 21, 1983, on the Freedom of Information Act. Appearing before the Subcommittee were the following witnesses: On April 18, the subcommittee took testimony from Jonathan Rose, Assistant Attorney General from the Department of Justice; Charles Rowe, editor and co-publisher, Free Lance-Star, Fredricksburg, Va.; William Taft, General Counsel, for the Department of Defense; Joan Claybrook, president, Public Citizen, Inc.; and James O'Reilly representing Procter and Gamble.

On April 21, the Subcommittee heard from William Webster, Director of the Federal Bureau of Investigation; Bob Lewis, Treasurer, representing the Society of Professional Journalists, Sigma Delta Chi; Professor David O'Brien, School of Law, University of Virginia; Allan Adler, legislative counsel for the American Civil Liberties Union; and Dr. Page Putnam Miller, director of the National Coordinating Committee for Promotion of History.

In addition, the Subcommittee received a large number of written statements from other interested individuals and organizations that will become part of the permanent record of these hearings. Senator Orrin G. Hatch of Utah, Chairman of the Subcommittee on the Constitution chaired the hearing of the Subcommittee.

At the conclusion of these hearings, the Subcommittee on the Constitution unanimously approved S. 774, which is virtually identical to S. 1730 from the 97th Congress, with three noncontroversial amendments. The first amendment changed the provision permitting an agency to retain one-half of any fees it collects under the Act to provide some incentive for agencies to comply with the time limits of S. 774. Accordingly, an agency may not retain collected fees (but must remit them to the Treasury) if the General Accounting Office or the Office of Management and Budget finds that the agency is not in substantial compliance with the time limits. This amendment was the recommendation of Senator Leahy.

Another subcommittee amendment brought the standard for privacy protection in the Seventh Exemption into conformance with the other amended standards in the exemption. The language "would constitute an unwarranted invasion of personal privacy" was changed to "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Finally, a new provision was added requiring an agency to list in the Federal Register any statute relied upon to withhold information under the Third Exemption. This will, for the first time, facilitate an authoritative listing of all statutes triggering withholding under the Third Exemption. With these three alterations, the Subcommittee approved the bill unanimously.

On June 16, the full Judiciary Committee, chaired by Senator Strom Thurmond of South Carolina, considered the Subcommittee version of S. 774. Without objection, the bill, as amended by the Subcommittee, was ordered favorably reported.

Section-by-Section Analysis

SECTION 2: FEES AND WAIVERS

Uniform schedule of fees

One problem identified by witnesses before the Committee is the current lack of uniformity of fee schedules at the various agencies. These variations can lead to confusion among members of the public who deal with different agencies. Although some of the variations in fees do appear to reflect real differences in the costs to the agencies, in most cases greater uniformity of fee schedules would be possible and desirable.

The bill accordingly authorizes the Office of Management and Budget to promulgate, pursuant to notice and receipt of public

comment, guidelines to all agencies to promote a uniform schedule of fees. Each agency would be subject to these guidelines in establishing its schedule of fees. This provision would promote uniformity of fee schedules throughout the government while preserving the flexibility of particular agencies to take account of peculiar fee considerations.

Review costs

Section 2 of S. 774 would amend subsection (a)(4)(A) of the FOIA to require that fee schedules provide for the payment of "all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request." Section 2 also provides that the term "processing," as used in the amendment, "does not include services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request, but does include services involved in examining records for possible withholding or deletions to carry out determinations of law or policy."

Current law, as established in the 1974 amendments to the FOIA, requires that fee schedules provide for payment limited to the "recovery of only the direct costs" of search and duplication. As specifically noted in the 1974 Conference Report, costs to the agency for "examination or review" of records cannot be included in fees charged to requesters.

The Committee now proposes to authorize recovery of such review costs because testimony presented at Committee hearings established that the number of FOIA requests handled annually by agency personnel—and the consequent processing costs now borne by the Government—far exceed those anticipated by Congress when it determined not to permit recovery of review costs in 1974. Moreover, recovery of such processing costs is consistent with the policy of the Federal user fee statute. 31 U.S.C. § 9701.

S. 774 would permit agency fee schedules to provide for recovery of the costs of reviewing responsive records to determine what material should be released to the requester and what material should be withheld pursuant to one or more of the exemptions in the FOIA. "Processing"—the term used to describe such reviewing—is expressly defined to include "services involved in examining records for possible withholding or deletions to carry out determinations of law or policy," and to exclude "services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request." Thus, apart from search and duplication, those "processing" services for which fees may be assessed must involve implementation of established disclosure law and policy through review and redaction of documents. Such "processing" services would not include any legal consultations within an agency for purposes of resolving a disclosure policy of general application.

Recoverable "processing" costs do not include costs expended in processing administrative appeals. Administrative "overhead" costs cannot be considered as "processing" costs and cannot be assessed in charges to a requester at any time.

An exception from the normal cost recovery principle is provided for situations in which members of the public request documents and the costs of collection of fees for the request would exceed or equal the amount of the fee. Where routine collection and processing of the fee would cumulatively cost the government more than the sums which the individual requester would pay, the agency should not charge a fee. Many agencies currently operate under such a policy on a formal or an informal basis. For example, a recent report by the General Accounting Office found that some units within the Department of Justice do not charge a fee unless search and duplication costs exceed $25. This section adopts this approach and requires the agency, consistent with the OMB guidelines, to set a threshold figure, below which the agency will not charge for disclosure requests.

Commercially valuable technological information

Section 2 of S. 774 would amend subsection (a)(4)(A) of the FOIA to permit agencies to charge a "fair value fee" or royalties, in addition to other processing fees, in the case of a request for records containing "commercially valuable technological information which was generated or procured by the Government at substantial cost to the public, is likely to be used for a commercial purpose, and will deprive the government of its commercial value."

The Committee heard testimony from the Department of Defense and others complaining that present FOIA fee provisions now require valuable technological information to be released to private parties for fees that reflect little more than the cost of copying. Commercial use of such information by FOIA requesters results in an unjustifiable windfall to a few people, who personally obtain financial gains from information that all taxpayers paid to develop. In one case, for example, the current law permitted a Japanese company to acquire at a pittance sophisticated water desalinization technology that American taxpayers paid large sums to develop.

The Committee proposes to amend the FOIA to carry out federal policy set forth in the Federal User Fee statute, 31 U.S.C. 9701, to allow agencies to be "self-sustaining to the full extent possible" through authority to "recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public." *New England Power Co. v. Federal Power Commission,* 467 F.2d 425, 428 (D.C. Cir. 1972). Disclosure under such policy would not require the government to be deprived of the income it might otherwise receive in the form of licenses and royalties for licensable technological data.

The Committee intends "commercially valuable technological information" to mean only such technical information as was generated or procured by the Government at substantial cost to the public, is likely to be used for commercial purpose, and will deprive the Government of its commercial value. This is not intended to cover statistical data, such as that gathered by the Census Bureau or the Bureau of Labor Statistics. Only requesters who are likely to receive a commercial benefit from "commercially valuable technological information" obtained through the FOIA may be assessed a fair value fee or royalty. This means, for example, that a requester who seeks such information for the purpose of examining and eval-

uating a particular Government activity to which the information is relevant, and the information is not likely to be used for commercial purpose, may not be assessed any fair value fee or royalties. The regulations should make provision to spread the cost of the technical data amongst all requesters. Recouping governmental research and development costs when a requester makes an FOIA request for commercially valuable technological data is warranted when limited to circumstances such as those mentioned above. Thus, the Committee intends to limit "commercially valuable technological data" to any blueprints, drawings, plans, instructions, computer software and documentation, or similar technological information that can be used or adapted for use to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any valuable equipment or technology.

The Committee would provide that fee determinations take into account the estimated value of the information in the commercial marketplace; government costs of generating or procuring such information; the commercial use intended, on the one hand; as well as any public interest in encouraging the utilization of that information. Moreover, this provision does not affect an agency's discretion to release technological information free of charge when the public interest, the mission of the agency, and budgetary consideration would be best served.

The Committee would also provide that this provision not override fees chargeable under user cost recovery statutes, or other statutes setting levels of fees for particular types of records. See *SDC Development Corp.* v. *Mathews,* 542 F.2d 116 (9th Cir. 1976).

Fee waiver issues

The debate about the effectiveness of the FOIA often concerns interpretations of the exceptions, but access to information can be scuttled as effectively by the barriers of cost as by overly broad exceptions. As a result of an extensive report by the House Government Operations Committee in 1972, Congress was well aware of the use of excessive charges to deny access when the FOIA was amended in 1974. In that year the fee waiver provision was enacted, and the Senate Report made it clear that the section was to be liberally construed by the agencies to promote access.

The liberal construction principle is an important factor in the interpretation of the fee waiver provision, and it has been cited with approval by the courts. See, e.g., *Eudey* v. *Central Intelligence Agency,* 478 F. Supp. 1175 (1979); *Rizzo* v. *Tyler,* 438 F. Supp. 895 (1977).

Congress and the courts notwithstanding, evidence on agency fee practices supports oversight findings that "[m]ost agencies have been too restrictive with regard to granting fee waivers for the indigent, news media, scholars, and nonprofit public interest groups." Report on Oversight Hearings by the Staff of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, "Agency Implementation of the 1974 Amendments to the Freedom of Information Act, 95th Congress, 2d Session 90 (March 1980) (Committee Print).

These problems were still evident on January 7, 1983 when the Department of Justice issued new guidelines on the administration

of the fee waiver provisons of the FOIA, which do not mention the principle of liberal construction and which instead emphasize the agency's view of the pubic's need for the requested information.

When applying any administrative guidelines, agencies should remember the language of the 1974 conferees that "Fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information."

Fee waiver provisions in S. 774

S. 774 proposes changes in current law which are intended to effectuate the Congressional intent contained in the 1974 Amendments to the FOIA by describing more clearly the circumstances in which Congress intends fees to be waived or reduced.

In the present law, Sec. (a)(4)(A) requires documents to be furnished to the requester without charge or at a reduced charge where the agency determines that such action is in the public interest "because furnishing the information can be considered as primarily benefiting the general public." Sec. 2 of S. 774 makes it absolutely clear that the "general public" is to be distinguished from the "commercial or other private interests of the requester." Sec. 2 goes on to state that "With respect to all other charges, where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media, or (c) a nonprofit group that intends to make the information available to the general public," a complete waiver is required.

With respect to recoverable search and duplication fees, S. 774 retains the current language for waiver or reduction of fees where disclosure "can be considered as primarily benefiting the general public," and adds the clarifying phrase "and not the commercial or other private interests of the Requester." This addition expressly states what was previously implied, i.e., that benefit to the general public is to be distinguished from personal benefit to the requester.

The existing standard for fee waivers or reductions, thus, will continue to require a balancing of "benefit to the general public" against "commercial or other private interests of the requester." Where news media organizations—a television station, for example—are making the request, the enormous "benefit to the general public" of news dissemination, will ordinarily prevail to make them eligible for waiver or reduction of search and duplication fees. An unduly large or unfocused request, however, even in these instances may affect the fee assessment decision. Other interests that, in a similar fashion, are likely to warrant waiver or reduction would be nonprofit organizations and researchers whose work will be made available to the general public.

With respect to all other charges, S. 774 would require a mandatory waiver of all new processing fees where the agency determines that the request does not have a commerical purpose and the requester seeks the information in the course of research or newsgathering, or is a nonprofit group intending to make the information available to the public. The "other charges" specified are those assessed to recover "processing" costs.

The Committee wishes to make it clear that for purposes of this section, the phrase "requested for a commerical use" does not include requests by representatives of the news media which operate on a for-profit basis.

The fee waiver language of S. 774 makes it clear that agency officials should look to see if the information is truly going to the public but should not ask whether it is something the public really wants and needs. The difference is crucial, for once government becomes the deciders of what is, and is not, important to know, the freedom in Freedom of Information departs and individual prejudices come to dominate.

In this sense the January fee waiver guidelines of the Department of Justice take a different view of fee waiver procedures from that of the Committee and would not accord with the intent of S. 774. The first two of five criteria in the DOJ guidelines ask if there is (1) genuine public interest in the subject matter of the documents and (2) value to the public of the records themselves. The guidelines are correct that there is an agency determination to be made under the fee waiver language in sec. (a)(4)(A), but that determination should be directed at the issue of whether the information will primarily benefit the general public, as opposed to private interests. The agency will still be left with a determination of whether the chain of transmission from the agency file, to the requester, and finally to the public is one that will exist in fact or is merely one suggested by the requester without substantiation. In addition, the agency retains its discretion to consider whether a particular request is unusually large or vague when considering a fee waiver request. But if a reporter or a scholar seeks information, an agency should not seek to decide whether the news story or research project should be undertaken or whether the public will really benefit from the requester's undertaking, once they have seen it.

The Committee recognizes that commercial requesters, rather than those falling within the categories above, are responsible for the bulk of such costs. Therefore, the language of the bill excluding requesters in the three enumerated categories from assessment of such "processing" charges should not add any substantial financial burden to the government.

Ultimately, the Committee believes that a strong and effective fee waiver policy will prove to be a cost-effective way to expose wasteful or corrupt government and to provide valuable new insights into government practices and policies.

The amendments contained in S. 774 do not affect fee policy with respect to requests from individuals under the Privacy Act.

Disposition of fee collections

A well-articulated comment was made by several of those appearing before the Committee that agencies have no source of funds to compensate for the additional processing costs of FOIA requests and that cost can sometimes strain the agency budget. While the Committee acknowledged this problem, it wished to strongly link its solution to the concomitant problem of excessive delays in responding to FOIA requests.

Where an agency is in substantial compliance with its time limits, this subsection permits the retention of one-half of its compliance costs revenues, which the agency shall apply to offsetting its own costs of complying with FOIA disclosure requirements. But if the General Accounting Office or the Office of Management and Budget conducts an investigation and concludes in a report that any agency has not been in substantial compliance with the time limits contained in Sec. 552(a)(6), the agency may not retain fees collected after the date of the report and may not resume retaining such fees until the agency making the finding determines that the substantial noncompliance has ended.

This provision reflects a strong Committee view that a sense of fairness is an inherent element in any government response to a citizen's request under the FOIA. An agency that is fair will generally meet FOIA time limits and will want to do so because adherence to time limits is the only rule that will guarantee the effectiveness of the Act, given the limited means of most requesters and the size and power of most agencies. But an agency that is consistently fair should have some financial reward, and up to now that reward has not been given. This provision stresses fairness to both the requester and the agency and should result in greater cooperation between the two.

The Committee intends that any agency which, by virtue of its current statutory mandate, e.g., the Tennessee Valley Authority, maintain fee collections shall be unaffected by this provision.

SECTION 3: TIME LIMITS

In 1974, Congress established time deadlines for the handling of FOIA requests, in response to evidence that agency delay was the major obstacle to use of the Act by the press and other members of the public. Hearings in 1977 before the Subcommittee on Administrative Practice and Procedure and in 1981 before the Subcommittee on the Constitution have revealed that most agencies are complying with the administrative response times enacted in 1974. However, some agencies, including the Department of Justice and the CIA have been unable to meet these deadlines.

In view of the Committee's recognition that delay in processing requests is often tantamout to denial of the public's right of access to government information, the bill retains the essential structure of the Act's time deadlines—10 working days for a response to an initial request and 20 working days for response to an appeal. However, the Committee also recognizes that the unexpectedly large number of FOIA requests filed since the enactment of the 1974 Amendments warrants some additional time for agency response in specified unusual circumstances. Accordingly, the bill amends existing law in certain respects.

Under the 1974 Amendments, an agency was allowed a limited extension of time for processing a request or appeal. This extension was not to exceed 10 working days. Section (a)(6)(C) is amended to provide for extensions of the 10- or 20-day time limits for a period not to exceed an aggregate of 30 working days. Thus, for example, where a full 30-day extension is sought for the initial response to a request, no further extension will be available on appeal. Accord-

ingly, under the time limits as amended, the total period for processing should not exceed 60 working days, except under "exceptional circumstances."

Furthermore, as the Act now provides, extensions will be allowed only in specifically defined "unusual circumstances." The bill adds three new definitions of unusual circumstances to those specified in 1974. For example, the bill permits an extension where the head of an agency specifies in writing that a request "cannot be processed within the limits stated in paragraph (6)(A) without significantly obstructing or impairing the timely performance of a statutory agency function." This provision is to be invoked where compliance with the 10- and 20-day time limits of the Act would significantly obstruct or impair the agency's ability to perform its other statutory responsibilities in a timely fashion.

The need for notification of submitters of information and for consideration of any objections to disclosure is intended to accommodate the new business confidentiality procedures added in section 4 of the bill. These procedures have been specifically tailored to allow agencies to meet the requirements for notice and the submission of objections within a sixty working day time frame.

The existence of "an unusually large volume of requests or appeals by an agency, creating a substantial backlog," is another circumstance justifying the new 30-working day extension. In order to invoke this provision, the number of requests an agency receives must be unusually large. Absent this condition, this section may not be used to invoke the 30-day extension, nor is it intended to perpetuate the substantial backlogs which currently persist at such agencies as the FBI and CIA. Under these provisions, the Committee intends that these agencies will, as soon as possible, eliminate the delays which in the past have forced requesters to wait up to six months or more for a response.

If an agency fails to comply with these deadlines, a requester shall be deemed to have exhausted administrative remedies and may file suit in Court. The bill retains the language, interpreted in *Open America* v. *Watergate Special Prosecution Force,* 547 F.2d 605 (D.C Cir. 1976), which permits a court to determine that "exceptional circumstances" justify additional time for processing, where an agency is otherwise exercising due diligence in responding to a request. However, the bill adds the following sentence: "An agency shall not be considered to have violated the otherwise applicable time limits until a court rules on the issue."

This sentence is added only for the purpose of ensuring that agencies will not be perceived to be in violation of law in cases where a court ultimately determines that it has properly invoked the "exceptional circumstances" provision. It is not intended in any way to affect the first sentence of subsection (C), which clearly states that a requester shall be deemed to have exhausted administrative remedies, and is thus eligible to file suit, whenever the agency fails to comply with the time limits provisions of this section. Nor is it intended to in any way affect a court's ability to retain jurisdiction over a FOIA case even after it concludes that "exceptional circumstances" warrant additional time for processing. The Committee recognizes that it may be appropriate for the court to impose a deadline for completion of the administrative

process and then proceed to consider the requester's claims if any documents are withheld. Moreover, this sentence is not intended to in any way affect the operation of the attorneys fees provision of section (a)(4)(E).

Finally, the bill adds a provision which recognizes that, in compelling circumstances, a FOIA request should be processed on an expedited basis. The Committee intends that such relief be afforded all requesters who can demonstrate a genuine need and reason for urgency in gaining earlier access to Government records. For example, where the request is from a journalist seeking information about a newsworthy event, a timely response may require processing in less than the 10- and 20-day time frames established in the Act.

With the relief afforded by these amendments, and the additional resources which will be recouped by the agency through the new formula for the disposition of collected fees, the Committee intends that all agencies thereafter will come into substantial compliance with the time limits here specified.

SECTION 4: BUSINESS CONFIDENTIALITY PROCEDURES

Section 4 of S. 774 would amend subsection 552(a) of the FOIA to require agencies to promulgate regulations specifying procedures that would permit submitters of trade secrets or confidential commercial or financial information to present claims of confidentiality to an agency before submitted information is released in response to an FOIA request.

When Congress enacted the FOIA in 1966, it expressly sought to protect legitimate confidentiality interests of the private business sector by exempting trade secrets and confidential commercial or financial information from the mandatory disclosure requirements of the Act. Unfortunately, however, Congress did not provide submitters of such information with any procedural rights that would enable them to ensure that their confidentiality interests would be adequately comprehended and considered by an agency confronted with the task of determining whether submitted information should be disclosed or withheld in response to an FOIA request.

The absence of any statutory requirements for an agency to give submitters notice and an opportunity to oppose disclosure with respect to FOIA requests for submitted information left the protection of business confidentiality interests entirely in the hands of agency personnel, who may not possess sufficient knowledge to fully appreciate such interests in the context of particular records. This situation is in large part responsible for the doubts that have been voiced within the business community about the government's ability to protect business confidentiality interests.

In response to this concern, the Committee proposes to amend the FOIA to require agencies to create specific procedures that would permit any business submitter to make an agency aware of his particular confidentiality concerns with respect to submitted information that is sought by a third-party under the FOIA. The Committee believes that it is both important for submitters to enjoy procedural rights before records are released and also important to balance those rights against the public interest in obtaining

nonexempt material promptly, and these procedural reforms should not result in undue delays.

Under section 4 of S. 774, agencies are directed to use informal rulemaking under § 553 of title 5 to specify their procedures for the handling of exempt private business information. Many agencies already have such rules in place. The agency has the option to specify in its rules that the submitter must designate information which is within several classes.

The agency may choose to require designation of trade secrets, commercial, research, financial or business information. The information designated must, however, be alleged to qualify for protection under Exemption 4 of the Act.

Timing of the designation will necessarily vary. The designation should be made in the submission of forms to the agency if the agency provides notice of the need for and opportunity for designation. The requirement that designation occur must, in fairness, be communicated adequately to those who would incur the financial consequences of a failure to designate. Where the agency inspects or audits the private firm and removes records, notes, photographs, etc., the agency has an obligation thereafter to provide fair opportunity for designation of the material which the submitter believes to be exempt. And the designation is intended to be as administratively simple as possible. The agency can require identification of portions which are confidential. Some agencies now make the submission of information the equivalent of an adjudicated examination of its exempt status (*see, e.g.*, 40 C.F.R. § 2.204, EPA). Such a burden is not intended to be part of this designation requirement.

Notification that an agency is planning to take an adverse action is one of the most basic of administrative procedural rights, yet until this amendment it had by inadvertence been omitted from the procedures required under the Freedom of Information Act. Since notifications will not be required where the information will be either withheld or clearly must be disclosed. The number of notifications is not expected to be excessive. Enactment of this section carries through on the Supreme Court's statement concerning the Administrative Procedure Act, where the court applied APA remedies in the FOIA context: "Congress made a judgment that notions of fairness and informed administrative decision making require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979). Notification is not required under several circumstances, discussed under § 552(a)(7)(B) below.

Written objections may be made by the submitter, upon the agency's decision to disclose the documents. These objections should specify all the grounds then known to the submitter upon which the submitter contends the information should not be disclosed. A submitter who learns of additional factual information relevant to the disclosure decision, e.g., from an accounting or market study, should present that information promptly for consideration by the agency.

The submitter who wishes to assert an objection to disclosure should submit the information within 10 working days after the postmark date of the agency notification. Where because of delays in mail or geographical distance from the agency, the submitter

does not have sufficient opportunity to reply within the 10-day period, the submitter should communicate to the agency informing the agency that the answer is being transmitted to the designated agency official. An agency will balance the fair handling of submitter communications with the need to expedite the disclosure process. There may also be cases in which notification is not received by the submitter, but in which the submitter learns of the pending request for disclosure from a public log of requests or another source. Objections under this section may be filed with the agency prior to the receipt of a notification under the subection (a)(7)(A)(ii).

The submitter must be provided with notice of the agency's final decision regarding release. This provision connects with the waiting period described in subsection (a)(7)(C) below.

The provision for notifications to submitters may be excused under several defined circumstances subject to any other requirement of law, the agency has full discretion to provide the notification, notwithstanding the exception, if it chooses to do so.

If an agency decides that the request should be denied, notification need not be given. It should be given later if the agency changes its position upon a requester's administrative appeal of the denial. If the agency makes a finding that the information in fact has been lawfully made available to the public by the submitting person, then the claim to notification would not stand. Of course, an agency should give notification in case of doubts, for sometimes the information which appears to be public is merely misleading speculation about private commercial activity rather than lawful publication. Wrongful taking of the information, e.g., disclosure by another commercial firm in breach of contractual obligations to the owner, does not constitute lawful availability to the public.

If a final rule requires designation of confidential information and the submitter fails to substantially comply with the rule, notice may be excused. The submitter's failing will be measured against the precision with which the agency has carried out its own responsibility to give notice of the requirements for designation of confidential information. Designation is optional with the agency.

Notification is also excused if a federal statute, other than 5 U.S.C. § 552, requires disclosure by law, if the agency has notified the submitter concerning the disclosure requirement prior to submission of the information. The term "by law" has the same content as its interpretation in *Chrysler* v. *Brown*, 441 U.S. 281 (1979). Such notice to the submitting person must be explicit and may take the same form as the Privacy Act statement required under 5 U.S.C. § 552a(e)(3), or other express written notice.

The final exception from notification occurs when a criminal law enforcement agency acquired the information in the course of a lawful criminal investigation. This exemption provision parallels the Privacy Act exemption for law enforcement operations. 5 U.S.C. § 552a(j)(2). The Committee intends that the principal function of the agency be enforcement of criminal laws, including police efforts to prevent, control or reduce crime or to apprehend criminals, such as the functions of the Federal Bureau of Investigation and the United States Secret Service. Many agencies have some statutory criminal sanctions in their otherwise civil enforcement

schemes, but these are not within the *narrow meaning of criminal* law enforcement agencies for purposes of this exception from notification.

The agency should communicate to the requester on two occasions, when it notifies the submitter of a receipt of a request for information and when it notifies the submitter of its final decision.

After forwarding to a submitter who has objected to disclosure, its final decision to disclose the agency must wait 10 working days before making disclosure of the records.

Where either requester or submitter initiates a suit, the other party will have no obligation to exhaust its administrative remedies before interposing its defense or taking other action in the proceeding.

Section (a)(7) is purely procedural in nature. It has no effect on existing law which covers the substance of the confidentiality decision, including specific withholding statutes under Exemption 3, 5 U.S.C. § 552(b)(3), such as the Census Act, 13 U.S.C. § 214, and the Federal Trade Commission, 15 U.S.C. § 57–2. The rights established by law protecting these private confidentiality interests continue unaffected by these procedural provisions.

SECTION 5: JUDICIAL REVIEW

Section 5 of the bill would make several procedural and substantive revisions to the judicial review provisions of 5 U.S.C. § 552(a)(4). First, the bill would amend subsection (a)(4)(B) to include a statute of limitations, and to provide equivalent jurisdiction in the district courts for suits by submitters of information to enjoin an agency's disclosure of information and requesters of information to compel disclosure.

Second, this section makes it clear that the courts have jurisdiction to enforce sections of the Act other than those requiring the disclosure of records. Thus the section permits suits for injunctive relief against non-indexing of records covered by subsection (a)(1) or (a)(2).

Third, the bill would amend the attorney fees provisions of redesignated subsection (a)(4)(H) (currently subsection (a)(4)(E)) to allow requesters who substantially prevail to recover attorney fees from a submitter participating in litigation.

Statute of limitations

The present Act contains no time limit for a requester to initiate a judicial action after an agency's final denial of a request. The bill would amend subsection (a)(4)(B) to require that suits by requesters must be brought within 180 days of the agency's final administrative action. This is the same period as that set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–5(e), 2000e–16(c); the Age Discrimination in Employment Act, 20 U.S.C. § 633(d); and the Fair Housing Act of 1968, 42 U.S.C. § 3613(a). The bill would not set a specific limitations period for actions by submitters. However, it would establish as a prerequisite to district court jurisdiction, that the submitter must file a complaint before the information is disclosed.

This provision should promote judicial economy and ease administrative burdens without prejudice to requesters of information. Agency personnel would be able to close files instead of holding a requester's file indefinitely in anticipation of a lawsuit to compel disclosure at any time in the future. Requesters could always file an identical request to reinitiate the process which would initiate anew the request and give them a fresh cause of action if the new request is denied.

Subject matter jurisdiction

The bill would amend subsection (a)(4)(B) to vest the district courts with jurisdiction to enjoin an agency from any disclosure of information which was objected to by a submitter under subsection (a)(7)(A)(iii) (or which would have been objected to had the submitter received the required notice from the agency pursuant to subsection (a)(7)(ii)). Under the amended provision after an agency's decision to disclose, the submitter may file a complaint at any time prior to the disclosure of the information by the agency.

This provision would create a right of action for submitters within the structure of the Freedom of Information Act. Under present law, submitters have no such right to action under the Freedom of Information Act, but must resort to section 10 of the Administrative Procedure Act, 5 U.S.C. §706, in order to safeguard confidential business information from disclosure by the government. *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 285, 317–18 (1979). This bill would establish procedural rights for submitters in the Freedom of Information Act itself. This section changes the judicial review provisions of the current Freedom of Information Act to establish equivalent causes of action for requesters and submitters.

Submitter actions to enjoin disclosure must be brought prior to release of the documents, and usually will be commenced within 10 days after the final agency decision. If the submitter has not been given notification but learns of the pending disclosure, suit may be brought in the same manner as if such notice had been given.

This subsection also clarifies that the courts may order injunctive relief against non-publication or non-indexing of records covered by subsection (a)(1) or (a)(2) of this section. *See,* e.g., *American Mail Line, Ltd.* v. *Gulick,* 411 F.2d 696, 701 (D.C. Civ. 1969); *Epstein* v. *Resor,* 421 F.2d 930, 932 (9th Cir). *cert. denied,* 398 U.S. 965 (1970). The Committee intends that agencies may be required to index records within a reasonable time if they have not done so already under existing requirements.

Personal jurisdiction

Proposed subsection (a)(4)(C) would provide the district courts with personal jurisdiction, in any suit filed under the Act, over all requesters and submitters of information. If a requester filed a complaint to compel disclosure of certain information, the district court in which the complaint was filed on its own motion would have jurisdiction over any submitter of the information. Similarly, in a suit by a submitter, the court would have jurisdiction over any requester of the information. These proposed provisions would ensure that an adverse party receives notice of the complaint, has the right to intervene, and will be bound by the court's decision.

While this provision allows a district court to consolidate submitter and requester causes of action into a single suit, it does not alter current law with regard to venue. In a consolidated suit, venue would be determined in accordance with the current statutory standards.

Notice of litigation

When the agency is served with a copy of the complaint filed by either requester or submitter, it must promptly give notice of the action to the opposite party or to multiple submitters or requesters, as the situation may warrant. This is already the better agency practice, and it is endorsed.

Proposed subsection (a)(4)(D) would require agencies to notify requesters and submitters whenever a suit is brought concerning a particular request or submission. If a person who requested confidential business information exempt under Exemption 4 filed a complaint to compel disclosure, the agency would be required to notify each submitter of that information that the complaint had been filed. Similarly, if a submitter filed a complaint to enjoin disclosure of such information, the agency would be required to notify each requester.

Subsection (a)(4)(E) provides equal treatment for requesters and submitters in the action, by requiring that cases brought by each party shall be determined *de novo* by the court. The judicial determinations made *de novo* under the current law have operated to enhance the credibility of the decisions made about disclosure by agencies, since an impartial judge will consider the full merits of the case for disclosure unconfined by the agency's record. The same impartiality and thus the same credibility will be brought to cases seeking the nondisclosure of private information upon complaint of the private submitter.

Burdens of proof rest with the agency in a withholding case and with the submitter in a case seeking to enjoin disclosure.

Attorney fees

Subsection (3) of section 5 of the bill provides that the court may in its discretion award attorney's fees and costs against a submitter who is a party to the litigation, in favor of the requester who has substantially prevailed in the litigation. This does not change the existing case law which permits such recoveries against the agencies themselves, in order both to encourage private enforcement of, and agency compliance with the Act. For the same reasons, the Committee bill would allow a requester who substantially prevails in litigation to recover attorney's fees against a submitter who has sought to enjoin the disclosure of requested records. The discretionary standards articulated in current case law interpreting the 1974 attorney's fees provision should apply. *See,* e.g., *Nationwide Building Maintenance Inc.* v. *Sampson,* 559 F.2d 704, (D.C. Cir. 1977); *Cuneo* v. *Rumsfeld,* 553 F.2d 1360 (D.C. Cir. 1977). Under these standards, a court retains discretion to award no fees or to award such fees only against agency.

SECTION 6: PUBLIC RECORD REQUESTS

Section 6 of S. 774 would amend subsection 552(a) of the FOIA so that in cases where a potion of the records requested "consists of newspaper clippings, magazine articles, or any other item which is a public record or otherwise available in public records" the agency may offer the requester a choice of (A) furnishing the requester with an index identifying such clippings, articles, or other items by date and source, provided that such index is already in existence, or (B) notwithstanding the waiver requirements contained in this section, furnishing the requester with copies of such clippings, articles, or other items at the reasonable standard charge for duplication established in the agency's fee schedule."

The Committee believes that the administrative burden of compliance with FOIA could be alleviated to a significant degree, without any consequent loss of public accountability, if agencies were not required to provide requesters with copies of records in agency files that are also readily available in the public domain. Public libraries, for example, have a wealth of newspapers and magazines on file which are easily retrievable and available to the public. Yet, requests under FOIA often require agency employees to duplicate hundreds of pages of materials that are public records or are otherwise available in public records.

The proposed amendment intends to accommodate this concern—as well as the concern that some public records (e.g. court records and even some newspapers and magazines) are not readily accessible except through the government due to the manner, place, and time in which they are created, used and stored—by specifically permitting the agency to offer the requester a choice between an index identifying requested items that are public records by date and source (if such an index exists), or copies of the documents for ordinary duplication costs. The first option, where it is available and appropriate, should contribute to reduction of the processing burden. In no event, however, should an agency be compelled to produce an index not already in existence at the time of the request. If no index exists, and the agency is unwilling to create one, the requester must be afforded access to copies of the records.

While the agency may charge search and copying fees notwithstanding the waiver requirements of the Act, the agency may, in its discretion, provide the requester with copies of the records at no charge.

SECTION 7: CLARIFY EXEMPTIONS

Section 7 of the bill is intended merely to clarify the effect of the exemptions listed in the paragraphs of section 552(b). In place of the current language stating that "This section (552) does not apply" to matters covered by the enumerated exemptions, the bill would make clear that "The compulsory disclosure requirements of this section (552) do not apply" to matters so exempted.

SECTION 8: MANUALS AND EXAMINATION MATERIALS

Section 8 of S. 774 would amend subsection (b)(2) of the FOIA to make it clear that certain materials are protected from disclosure

as matters that are "related solely to the internal personnel rules and practices of an agency." Materials included under subparagraph (A) are "manuals and instructions to investigators, inspectors, auditors, or negotiators to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations". This provision is intended to establish a uniform standard for withholding internal law enforcement manuals and instructions.

Since exemption 2 was first enacted in 1966, the case law has generally evolved to hold that such materials are protected under the exemption if disclosure would harm law enforcement efforts. See discussion of caselaw in *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). However, the decisions have not been uniform as to the degree of harm an agency must demonstrate to justify its withholding.

Under subparagraph (A), to withhold internal law enforcement manuals and instructions an agency must demonstrate that disclosure "could reasonably be expected to jeopardize" the investigations, inspections, or audits of the agency. The use of the word "jeopardize" is intended to require the agency to show that the effectiveness of investigations, inspections, or audits is likely to be imperiled if the document is disclosed. Likewise, instructions to negotiators are exempt if disclosure could reasonably be expected to jeopardize an agency's negotiations with a private party. Although the Committee believes that such internal deliberative communications among agency personnel are already protected under exemption 5 of the Act as inter-agency memorandums, these materials are included here to make it clear that they are protected as matters related solely to internal personnel practices. Subparagraph (A) is not intended to exempt internal agency guidelines which allow members of the public to conform their actions to an agency's understanding of the law, or "secret law", which the Committee emphasizes is antithetical to the act's fundamental principle of open government.

Materials included under subparagraph (B) are "examination materials used solely to determine individual qualifications for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process." This provision is included to bring the exemption into conformity with a similar exemption for such examination materials under the Privacy Act, 5 U.S.C. § 552a(k).

SECTION 9: PERSONAL PRIVACY

Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals. Exemption 6 of the Act was designed to give weight to both interests, by providing an exemption for "personnel and medical and similar files," if disclosure would result in a "clearly unwarranted invasion of personal privacy." The Supreme Court has described this balancing standard as "a workable compromise between individual rights 'and the preser-

vation of public rights to Government information.'" *Department of the Air Force* v. *Rose,* 425 U.S. 352, 381 (1976).

The Committee does intend to confirm in statutory form the Supreme Court's 1982 decision in *The Washington Post Company* v. *Department of State,* 456 U.S. 595 (1982), reversing a line of court decisions that interpreted the threshold "personnel, medical and similar files" language in an overly formalistic way. *See Board of Trade* v. *Commodity Futures Trading Commission,* 627 F. 2d 392 (D.C. Cir. 1980); *Simpson* v. *Vance,* 648 F. 2d 10 (D.C. Cir. 1980); *The Washington Post Company* v. *Department of State,* 647 F.2d 197 (D.C. Cir. 1981), *rev'd,* 456 U.S. 595 (1982).

The Washington Post case confirmed that information about "any particular individual" should not lose the protection of Exemption 6 "merely because it is stored by an agency in records other than 'personal' or 'medical' files." The bill makes it clear that when information concerning particular individuals is sought from government files, the protections granted under the exemption apply.

In addition, the bill makes two further changes which address the Committee's concern that the protection of the privacy interest be practical in its application. First, while the bill retains the "clearly unwarranted" balancing standard, information would now be exempt under this test if disclosure "could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy." The substitution of the "could reasonably be expected" language for the word "would" in the original Act is designed to make it clear that courts should apply a common sense approach to this balancing test. This change will eliminate any possibility of an overly literal interpretation of the use of the word "would" in the Act's original language and ensure that necessary privacy protection is provided.

Finally, the amendment makes it clear that lists of names and addresses which "could be used for solicitation purposes" are subject to the exemption, if disclosure could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy under the balancing test. By requiring the courts to balance the interest in disclosure of such lists against the interest in privacy, the Committee recognizes that disclosure may be appropriate in some circumstances. *See Disabled Officers Association* v. *Rumsfeld,* 428 F. Supp. 454 (D.D.C. 1977) (list of disabled retired military personnel disclosed to nonprofit organization established to assist members in pursuing benefits and advocating their interest nationally).

SECTION 10: LAW ENFORCEMENT RECORDS

Section 10 of S. 774 would amend paragraph (b)(7) of the FOIA to modify the scope of the exemption for law enforcement records, codify certain explanatory caselaw, and clarify Congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure.

Under current law, an agency may invoke the (b)(7) exemption to withhold "investigatory records compiled for law enforcement purposes" to the extent that disclosure of such records would interfere with enforcement proceedings; deprive a person of a right to a fair

trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identiy of a confidential source or, in certain cases, information provided only by a confidential source; disclose investigative techniques and procedures: or, endanger the life or physical safety of law enforcement personnel.

The Committee finds, based upon testimony of the FBI and other federal law enforcement agencies, that this exemption, in practice, has created problems with respect to the disclosure of sensitive non-investigative law enforcement materials, premature disclosure of investigative activities, and the protection of confidential sources. Although Exemption 7 currently attempts to protect confidential informants and investigations, this protection can be compromised when small pieces of information, insignificant by themselves, are released and then pieced together with other previously released information and the requester's own personal knowledge to complete a whole and accurate picture of information that should be confidential and protected, such as an informant's identity.

S. 774 would make the following changes in Exemption (b)(7) to address these problems:

Substitute "records or information" for "investigatory records" as the threshold qualification for the exemption: This amendment would broaden the scope of the exemption to include "records or information compiled for law enforcement purposes," regardless of whether they may be investigatory or noninvestigatory. It is intended to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which the record is maintained. *Cf. FBI* v. *Abramson,* 456 U.S. 615 (1982). It should also resolve any doubt that law enforcement manuals and other non-investigatory materials can be withheld under (b)(7) if they were compiled for law enforcement purposes and their disclosure would result in one of the six recognized harms to law enforcement interests set forth in the subparagraphs of the exemption. See *contra, Sladek* v. *Bensinger,* 605 F.2d 899 (5th Cir. 1979) (Exemption 7 is not applicable to DEA agents Manual because manual "was not compiled in the course of a specific investigation"), *Cox* v. *Department of Justice,* 576 F.2d 1302 (8th Cir. 1978) (Exemption 7 does not apply to DEA manual that "contains no information compiled in the course of an investigation.") The Committee amendment, however, does not affect the threshold question of whether "records or information" withheld under (b)(7) were "compiled for law enforcement purposes." This standard would still have to be satisfied in order to claim the protection of the (b)(7) exemption. See, e.g., *FBI* v. *Abramson, supra.*

Substitute "could reasonably be expected to" for "would" as a standard for the risk of harm with respect to (b)(7)(A) interference with enforcement proceedings, (b)(7)(C) unwarranted invasions of personal privacy, (b)(7)(D) disclosure of the identity of a confidential source, and (b)(7)(F) endanger the life or physical safety of any natural person: This amendment is intended to clarify the degree of risk of harm from disclosure which must be shown to justify withholding records under any of these subparagraphs. The FBI and other law enforcement agencies have testified that the current "would" language in the exemption places undue strictures on agency at-

tempts to protect against the harms specified in Exemption 7's subparts.

This burden of proof is troubling to some agencies in the context of showing that a particular disclosure "would" interfere with an enforcement proceeding. Moreover, as the FBI has testified, it is particularly vexing with respect to whether production of requested records "would" disclose the identity of a confidential source, substantially contributing to the asserted "perception" problem of sources doubting the FBI's ability to protect their identities from disclosure through FOIA. The "could reasonably be expected to" standard has been effectively used in the protection of national security sources under provisions of the National Security Act of 1947, 50 U.S.C. § 403(d)(3). It recognizes the lack of certainty in attempting to predict harm, but requires a standard of reasonableness in that process, based on an objective test.

Including State, local, and foreign agencies or authorities and private institutions within the meaning of "confidential source": This amendment is intended to codify the caselaw in which the weight of judicial interpretation has held that "confidential source" protection under (b)(7)(D) is applicable to entities, as well as natural persons, that furnished information to an agency on a confidential basis. *See, e.g., Lesar* v. *Dept. of Justice,* 636 F.2d 472 (D.C. Cir. 1980); *Church of Scientology* v. *Dept. of Justice,* 612 F.2d 417 (9th Cir. 1979); *Nix* v. *U.S.,* 572 F.2d 998 (4th Cir. 1978); *Keeney* v. *FBI,* 630 F.2d 114 (2d Cir. 1980).

Delete "only" from the second clause of (b)(7)(D): Courts interpreting the second clause of (b)(7)(D) have occasionally stumbled over the meaning of the word "only" in the context of deciding whether confidential information furnished by a confidential source in a criminal investigation or a lawful national security intelligence investigation may be withheld. *Compare, e.g., Radowich* v. *U.S. Attorney, District of Maryland,* 501 F. Supp. 284 (D. Md. 1980), *rev'd,* 658 F.2d 957 (4th Cir. 1981) (Winter, C.J., dissenting) with *Nix* v. *United States,* 572 F.2d 998 (4th Cir. 1978). A literal reading of the provision would appear to indicate that confidential information is exempt only if it has been "furnished" to the agency "only by the confidential source;" which is to say, apparently, that the confidential information would not be exempt if it has also been furnished to the agency by some other source or means.

By deleting the word "only", the Committee intends to make clear that, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished by a confidential source is exempt, regardless of whether it might also have been obtained from another source.

Delete "investigative" and add "guidelines" to (b)(7)(E): This amendment, like the deletion of "investigatory" from the exemption's threshhold language, is intended to facilitate the protection of non-investigatory materials under the exemption. In this case, it is intended to make clear that "techniques and procedures for law enforcement investigations and prosecutions" can be protected, regardless of whether they are "investigative" or non-investigative. The Committee, however, reemphasizes the intention of the confer-

ees on the 1974 amendments which first created (b)(7)(E) that the subparagraph does not authorize withholding of routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly-known techniques and procedures. See H.R. Rep. No. 93–1380, 93d Cong., 2d Sess. 12 (1974). The amendment also expands (b)(7)(E) to permit withholding of "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." This is intended to address some confusion created by the D.C. Circuit's en banc holding in *Jordan* v. *U.S. Dept. of Justice,* 591 F.2d 753 (D.C. Cir. 1978), denying protection for prosecutorial discretion guidelines under the (b)(2) exemption. The Committee intends that agencies and courts will consider the danger of creating "secret law" together with the potential for aiding lawbreakers to avoid detection or prosecution. In so doing, the Committee was guided by the "circumvention of the law" standard that the D.C. Circuit established in its en banc decision in *Crooker* v. *BATF,* 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2).

Informant records exclusion

Section 10 of S. 774 would amend the FOIA by adding a new subsection which would make the FOIA inapplicable to "informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier."

Although subparagraph (b)(7)(D) of the FOIA permits law enforcement agencies to deny public access to records where release "would disclose the identity of a confidential source," the Committee finds that the necessity of asserting this exemption to deny disclosure may in itself compromise informant confidentiality when the request is for an informant's records and the requester is a third party who has requested the records by the informant's name or personal identifier. Denying access to John Doe's records on the grounds that release "would disclose the identity of a confidential source" could be tantamount to confirming that John Doe is a confidential source.

S. 774 would exclude from the requirements of the FOIA informant records maintained by a law enforcement agency under an informant's name or personal identifier, but only in cases where the requester is a third party seeking access according to the informant's name or personal identifier. This provision operates as an exclusion. In such cases, the agency would have no obligation to acknowledge the existence of such records in response to such request. Where the requester is the informant himself, or a third party who describes the responsive records without reference to the informant's name or personal identifier, the records are subject to ordinary consideration under the provisions of the FOIA.

SECTION 11: ADDITIONAL EXEMPTIONS

Technical data

Section 11 of the bill would amend the FOIA by adding a new Exemption (b)(10) to exempt from mandatory disclosure, technical data that may not be exported lawfully outside of the United States except in compliance with the Arms Export Control Act, 22 U.S.C § 2751, et. seq., and the Export Administration Act of 1979, 50 U.S.C. App. § 2404.

Testimony from the Justice Department and the Department of Defense has made the Committee aware that technical data in the form of blueprints, manuals, production and logistics information formulae, designs, drawings, and other similar materials in the possession of agencies may be subject to release under the Freedom of Information Act. Much of this data was either developed by the government or more typically submitted to the government in conjunction with research and development or procurement contracts.

This new exemption would ensure that Congress intent to control the export of significant technology will not be frustrated by a Freedom of Information Act request for information regarding technology that is subject to export control under these statutes. It would make clear that agencies such as the Department of Defense have the authority to refuse to disclose such information in response to a Freedom of Information Act request when the information "may not be exported lawfully outside the United States without an approval, authorization or a license under the Federal Export laws unless regulations promulgated under such laws authorize the export of such data without restriction to any person and any destination."

Exemption 10, however, is not intended to restrict the flow in research information from or within the scientific community or society in general. Moreover, the proposed exemption has nothing to do with technical information developed and maintained within the academic community. On the contrary, this exemption merely gives the federal government the discretion not to disclose certain technical information in its possession, usually pursuant to research and development or procurement contracts, in response to an FOIA request. The submitter of such technical data is *not* in any way precluded from disseminating it to the scientific community or elsewhere, under the exemption.

It is the intent of the Committee that Exemption 10 encompass technical data in the forms above if such data is covered by either general licenses or specific licenses, inasmuch as a significant amount of important technical data may be exported under restricted general licenses or exemptions. Even though the term "general license" is used, such licenses often limit export authority to specific persons or specific destinations. Thus, a limited general license for the export of certain data could still subject such data to unlimited release under the FOIA if Exemption 10 did not cover general licenses.

It is anomalous to restrict the export of data important to the United States on one hand, while allowing its public release under the FOIA on the other. Exemption (b)(10) will redress that anomaly.

Secret Service

Section 11 of S. 774 would amend the FOIA to create a new Exemption (b)(11) for "records or information maintained or originated by the Secret Service in connection with its protective functions to the extent that the production of such records or information could reasonably be expected to adversely affect the Service's ability to perform its protective functions."

Although the courts have recognized the need to protect certain Secret Service records from disclosure under the FOIA, *Moorefield* v. *U.S. Secret Service*, 611 F.2d 1021 (5th Cir. 1980) (individual who was twice convicted for threatening the life of the President was denied access to his Service file under Exemption (7)(A)), the Committee believes that a specific exemption which directly focuses on the specific consequences of disclosure in the context of the protective responsibilities of the Service is more appropriate than reliance upon the more general law enforcement records exemption.

The Committee received comments from several press groups expressing concern that the proposed Secret Service exemption could permit the Service to refuse to disclose the basis for denying White House press credentials to a bona fide journalist. The Committee recognizes that important First Amendment rights are implicated by any refusal to grant White House press passes to bona fide journalists, and that journalists may not be denied such passes without due process of law, including notice of the factual basis for denial with an opportunity to rebut them. *Sherrill* v. *Knight*, 569 F.2d 124, 130–131 (D.C. Cir. 1977).

The Committee intends the proposed exemption to be interpreted in a manner consistent with this right.

SECTION 12: REASONABLY SEGREGABLE

This amendment is simply intended to take notice of the principle that, in the case of the 1st and 7th exemptions in subsection 552(b), in deciding whether the release of particular information would be harmful, the agency may take account of other information which it knows or reasonably believes to be available to the requester. This principle is established in case law. For example, in *Halperin* v. *Central Intelligence Agency*, 629 F.2d 144 (D.C. Cir. 1980), the court states:

> The Agency's general rationale for refusing to disclose rates and total fees paid to attorneys is that such information could give leads to information about covert activities that constitute intelligence methods. For example, if a large legal bill is incurred in a covert operation, a trained intelligence analyst could reason from the size of the legal bill to the size and nature of the operation. This scenario raises a reasonable possibility of harm to the covert activity following from disclosure of the size of legal fees. We note that the CIA's showing of potential harm here is not so great as its showing concerning attorney names. We must take into account, however, that *each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of in-*

formation even when the individual piece is not of obvious importance in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction. Viewed in this light, the Agency's statements offer sufficient plausible detail for a court to accord substantial weight to the statements and accept the Agency's expert judgment on the potential effects of disclosing legal fees.

Id. at 150, footnotes omitted and emphasis added.

SECTION 13: PROPER REQUESTS

Section 13 of S. 774 would amend 552 (a)(3) to prohibit FOIA requests by foreign nationals; authorize the Attorney General to prescribe limitations or conditions on use of the FOIA by incarcerated felons; and toll time requirements for agency response to requests from parties to adjudicatory proceedings in which the Government is also a party and may be requested to produce the records sought.

Under current FOIA law, an agency is required to comply with any request for records covered by the statute made by "any person". This absence of exclusion permits foreign nationals and governments, including those who are hostile to the interests of the United States, to freely utilize a statutory right-of-access scheme that was created primarily to inform the American public about government activities. At the same time, it permits incarcerated felons to file extensive FOIA requests for the purpose of harassing government officials or determining the identities of confidential law enforcement sources and prying into investigatory records. It also permits parties opposing the Government in judicial or administrative adjudicatory proceedings to duplicate existing discovery rights, to circumvent discovery requirements and to conduct extensive documentary "fishing-expeditions" that harass government attorneys and avoid triggering reciprocal discovery requirements.

The Committee views each of these uses of the FOIA to be outside the purview of Congress primary intent in enacting the statute. Although some salutary considerations may justify current practice in particular circumstances, the Committee finds that its essential concern for facilitating the use of FOIA in ways that contribute to an informed public and an accountable Government warrants certain limitations on requesters in the types of situations identified above.

Requests limited to "United States persons".--This would amend the FOIA to require agencies to make information available only to a requester who is a "United States person" as that term would be defined in Section 17 of the bill. This definition, would limit the use of the FOIA to United States citizens, permanent resident aliens, and certain corporations and unincorporated associations, as defined by section 17 of the bill. It would prohibit use of FOIA by any other person or entity. The Committee intends that any requester denied access pursuant to this limitation shall be given an opportunity to present proof that such requester is a "United States person" within the meaning of the provision.

FOIA limited as a discovery device.—The Supreme Court has recognized that the "FOIA was not intended to function as a private

discovery tool." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). According to the Court's interpretation of the act and its legislative history, a requester's rights "are neither increased nor decreased" because of the requester's status as a litigant. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143, n. 10 (1975).

In civil cases, parties often openly use the FOIA to bypass discovery procedures or to circumvent discovery requirements that they show a need for the requested information, the relevance of the information to the case, and that compliance with the request would not be unreasonably harassing, oppressive or burdensome. See Fed. R. Civ. P.26. Similarly in criminal cases, a defendant seeking discovery must demonstrate not only the relevance of the information sought, but also that the request is "reasonable" and within the scope of criminal discovery. See Fed. R. Crim. P. 16(a). In addition, a criminal defendant's request may trigger a government right to reciprocal discovery. See Fed. R. Crim. P. 16(b). In practice, some criminal defendants make frequent use of the FOIA close to scheduled trial dates to disrupt the prosecutor's case preparation or delay the trial while disputes over the FOIA request are resolved by the courts.

This provision remedies these concerns, not by declaring that a person's right to use the FOIA is eliminated because of his party status, but by requiring the tolling of time limits for government response "whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought."

The Committee intends that the agency's obligation to respond to the request within the statutory time requirements is simply postponed until the proceeding itself is no longer pending. The amendment does not bar a request for records which are not related to the subject matter of the pending proceeding, nor would it bar a request for records which have been denied during the course of a judicial or administrative proceeding that is no longer pending.

Authority for the Attorney General to Limit Requests by Felons.—Testimony by various federal law enforcement agencies, complaining of the tremendous administrative burden and risk of harm to law enforcement interests that flows from the extensive number of FOIA requests made by incarcerated felons, has convinced the Committee to approve authority for the Attorney General to promulgate regulations prescribing "limitations or conditions on the extent to which and on the circumstances or manner in which" requested records would be made available to "requesters who are persons imprisoned under sentence for a felony under Federal or State law or who are reasonably believed to be requesting records on behalf of such persons."

The proposed amendment directs the Attorney General to prescribe such limitations or conditions "as he finds to be (i) appropriate in the interests of law enforcement, or foreign relations and national defense, or of the efficient administration of" the FOIA, "and (ii) not in derogation of the public information purposes of" the FOIA. The Committee intends this guidance to assure the Attorney General of his authority to propose that requests from incarcerated felons, or from anyone reasonably believed to be acting

on their behalf, be treated differently from those of other requesters. For example these limitations can be fashioned to limit the number or extent of FOIA requests, to discourage duplicative or harassing requests, or to give the responding agencies greater flexibility in the mode and timing of their replies. Such limitations or conditions shall be prescribed through rulemaking.

SECTION 14: ORGANIZED CRIME RECORDS EXCLUSION

Section 14 of S. 774 would amend the FOIA by adding a new subsection (c) that would make the FOIA inapplicable to documents which were generated or acquired by a criminal law enforcement authority in the course of a lawful organized crime investigation within five years of the date of request.

Current law, as established by the 1974 amendments to the FOIA, permits agency withholding of law enforcement records under one or more of the subparagraphs of Exemption 7. It does not provide for any categorical treatment of records compiled in investigations of organized crime.

Testimony presented before the Constitution Subcommittee by FBI Director William Webster depicted a credible concern that the FOIA in its current form is systematically exploited by organized crime figures attempting to learn whether they are targets of investigative law enforcement activities. Both in public hearings and an executive session before the Subcommittee, Judge Webster presented examples of the use of the FOIA by organized crime figures in concerted efforts to identify informants and discover the scope and progress of particular investigations.

The Committee understands the skepticism of the press and other critics of the case presented by the FBI, for the Bureau's claims of abuse are not convincingly substantiated on the public record. The Committee, however, has viewed more substantial evidence in special executive presentations supporting the FBI's arguments, and understands the FBI's concern that the details of this evidence would have to be highly diluted or eliminated altogether to avoid aggravating the problem in any public presentation.

The Committee believes that special treatment of records compiled in current and recent organized crime investigations is essential. The FBI's showing of systematic exploitation of the FOIA by organized crime, together with the threat that such exploitation will increase in the future, carries sufficient weight to urge an adjustment in the FOIA when combined with reasonable assumptions concerning the motivations and resources of organized crime.

S. 774 proposes to exclude from the provisions of the FOIA, under specified circumstances, any record which was generated or acquired within five years of the date of the FOIA request by a criminal law enforcement agency conducting a lawful organized crime investigation. Under the amendment, the FBI would have no obligation to acknowledge the existence of organized crime records if: (1) the requested records were compiled in any lawful investigation of "organized crime" as defined in section 18 of S. 774; (2) such investigation is or was conducted by a criminal law enforcement authority for law enforcement purposes; (3) such investigation was designated by the Attorney General for the purposes of this subsec-

tion; and, (4) the requested records were first generated or acquired by the law enforcement agency within five years of the date of the request. Exceptions to the basic exclusion timeframe would be appropriate when the agency determines, pursuant to regulations promulgated by the Attorney General, that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years.

The proposed amendment also provides that no document subject to this exclusion provision may be destroyed or otherwise disposed of until the document is available for disclosure, subject only to the ordinary FOIA exemptions, for a period of not less than ten years. This means that, unless an extension of no more than three years is ordered, organized crime investigation documents would ordinarily be subject to exclusion from FOIA only for a period of five years after generation or acquisition by the agency. Documents subject to exclusion may not be destroyed or disposed of during the exclusion period, or for a period of not less than ten years after the end of the exclusion period. When the exclusion period is completed, the documents would become subject to the requirements of the FOIA and may be withheld from a requester only pursuant to a proper assertion of one or more of the nine FOIA exemptions.

SECTION 15: REPORTING UNIFORMITY

Under current 5 U.S.C. § 552(d), each agency is required to submit to the Congress by March 1 of each year a report on its Freedom of Information Act activities during the preceding calendar year. Section 15 of the bill would amend the reporting requirement to provide for a report to be filed on December 1 of each year covering the preceding fiscal, rather than calendar year. Most agencies maintain their records on a fiscal year basis and must convert them to an annual year basis in order to comply with existing law. The amendment would remedy this problem by conforming the reporting requirement to data collection practices.

SECTION 16: TECHNICAL DATA PROCEDURES

The Committee wishes to stress that nothing in Exemption (b)(10) is intended to limit the Government's ability or duty to provide access to information necessary to U.S. companies interested in investigating or bidding on procurement contracts with the Government. The Committee recognizes that prospective contractors, especially small businesses, need access to what is referred to as "production engineering and logistics information". Such availability may serve to increase competition, particularly by small businesses, and thereby reduce prices.

The Committee intends this section to apply to technical data owned by the Federal Government. Since this information is outside the protections of (b)(4), the combination of (b)(10) for protection and section 560 for qualified access should apply.

Section 560 is not to be construed as part of the Freedom of Information Act and none of the special administrative or judicial provisions of the FOIA apply to requests under Section 560. Releases under Section 560 may be conditioned on reasonable restrictions on redissemination, *e.g.*, requiring subsequent parties receiv-

ing the information to be properly registered or in appropriate cases, precluding redissemination. Agencies operating under Section 560 can investigate and enforce these agreements and failure by companies to comply with non-disclosure agreements may be grounds for appropriate civil, criminal or administrative sanctions.

Section 560 authorizes agencies to establish reasonable procedures to provide access to technical data to qualified concerns. The "production engineering and logistics data" referred to above includes such formulae, designs, drawings and research data as may be associated therewith, which are developed for or generated by the Government and which the Government has an unrestricted right to use and disclose.

It is expected that agency heads shall promulgate regulations setting forth procedures, standards and criteria for the certification and registration of United States citizens and business concerns as authorized recipients of such technical data. The Committee expects that in certifying data recipients, the agency will consider good faith intent to compete and ability of a concern and its subcontractors and suppliers to perform U.S. contracts.

It is also intended that an agency head may promulgate regulations which shall charge any person receiving information under Section 560 the actual cost of searching for and duplicating such information. In addition, if recoupment of research and development costs is required by law or regulations, recoupment shall be paid by the requester in accordance therewith.

It is further the intent of the Committee that nothing in Section 560 shall require the disclosure of material classified pursuant to executive order. Moreover, nothing in Section 560 requires the disclosure of material protected from disclosure under subsection (b)(4) of the Act.

SECTION 17: DEFINITIONS

"Submitter"

The term "submitter" is intended to include those persons who have a commercial or proprietary interest in information which is within the commercial, research, financial or trade secret categories discussed in the Committee's analysis of section 4 of the bill, supra. The person is a submitter even if the agency obtained access without a direct submission, e.g., by inspection or audit or recordation or photographing the private person's information. Two exclusions exist. Personal financial information is covered by the terms of Exemption (b)(6), see *Rural Housing Alliance* v. *U.S. Department of Agriculture,* 498 F.2d 73 (D.C. Cir., 1974). Intelligence information is protected under specific exempting statutes, recognized by exemption (b)(3), or by terms of exemption (b)(1). This latter exception is intended to shift protection to another exemption and is not intended to exclude exempt status for such information in the rare and exceptional instances in which commercial data would be given to an intelligence agency.

"Requester"

Section 17 of the bill defines the term "requester" as "a person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a)."

In part, this definition is intended as a mere drafting change in substitution for cumbersome phrases in the present Act, such as "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" and "such person making such request" (subsection (a)(4)(C)). However, this definition includes not only the person who makes the request but also any person who causes a request to be made or on whose behalf a requester is made.

"United States person"

Section 17 of the bill defines the term "United States person," which is discussed in connection with the analysis of section 13 of the bill.

"Working days"

Section 17 of the bill defines the term "working days" to mean "every day excluding Saturdays, Sundays, and federal legal holidays." This definition is essentially the same as the language of the present Act, and is intended to place conveniently in one provision of the Act the standard rule for calculating time periods under the Act. This defintion is not intended to be a substantive change.

"Organized crime"

Section 17 of the bill defines the term "organized crime," which is discussed in connection with the analysis of section 14 of the bill.

SECTION 18: PUBLICATION OF EXEMPTION 3 STATUTES

Exemption (b)(3) excludes from the mandatory disclosure requirement information "specifically exempted from disclosure by statute." There has never been a compilation of such statutory non-disclosure provisions. Thus, neither the Congress nor the American people know for sure how many (b)(3) exemptions exist or what their scope is. The absence of information creates a dilemma: If the aims of the FOIA are being weakened, Congress has little guide to how to shape a consistent policy that can cure the excesses, if they exist.

The chief commodity for a cure is complete information, and so the Committee's approach to solving this problem is based on disclosure. Within 270 days of enactment, agencies that want to rely on specific statutory exemptions will have to publish a list of them in the Federal Register. The Department of Justice is specifically included as an agency required to so publish. No legal rights are affected by the section, except those of the agency failing the effect the required publication. That agency will lose the right to rely on the undisclosed statutory exemption.

As a result of this provision, for the first time the Congress and the public will have a comprehensive guide to what is on the statute books within the ambit of section (b)(3). The public and the

Congress, thus, will be able to evaluate the effect of the (b)(3) exemption on the FOIA.

Regulatory Impact

In compliance with subsection 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that the business confidentiality procedures of S. 1730 will substantially improve the protection of trade secrets and other valuable commercial information submitted to the Government by regulated businesses. This should enhance the economic position of businesses and individuals who have in the past or might have possibly in the future lost such trade secrets or proprietary information to a competitor or some other requester pursuant to an FOIA request. The Committee also finds that S. 1730 will improve personal privacy protections for every individual about whom the Government maintains information. Finally, the Committee finds that no additional paperwork will be required of regulated businesses or individuals, but that the bill improves protections for personal privacy and commercial information.

Cost Estimate

In accordance with paragraph 11(a), rule XXVI of the Standing Rules of the Senate, the committee offers the following report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 11, 1983.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 774, the Freedom of Information Reform Act, as ordered reported by the Senate Committee on the Judiciary, June 16, 1983.

The bill requires the Office of Management and Budget (OMB) to establish a uniform fee structure to cover certain costs to the federal government resulting from the Freedom of Information Act (FOIA). Federal agencies are to use the OMB fee guidelines in constructing regulations governing the processing of requests for information. The fees collected under the bill are to be adequate to cover the costs of processing the requests. In addition, the bill requires federal agencies to provide documents free of charge when the cost of collecting a fee exceeds the amount that would be collected. Federal agencies are also allowed to reduce or waive the fee in cases where releasing the information will primarily benefit the public rather than the private or commercial interests of the party making the request. The bill also allows agencies to collect fees covering many of the costs of processing an application. Confidential information provided to the government by business concerns is afforded increased protection under the bill. The bill also increases the federal government's right to withhold certain information

from the public, including certain technical data and many Secret Service records.

The cost of administering the Freedom of Information Act are highly uncertain, and no comprehensive data are available. Based on information provided by the Justice Department, it appears that the direct cost of administering the act is at lest $60 million a year. Assuming this level of costs, the bill is expected to save the federal government at least $10 million a year—through the establishment of a uniform fee schedule, recovery of a portion of the cost of processing an application, various applicant exclusions, and an anticipated decline in the use of FOIA resulting from higher fees. However, in view of the uncertain costs of FOIA and the lack of information on the fee guidelines OMB will eventually propose, the savings resulting from this bill could be significantly greater.

Enactment of this bill would not affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

NANCY M. GORDON
(For Alice M. Rivlin, Director).

CHANGES IN EXISTING LAW

In compliance with subsection (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 774 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.
552. Public information; agency rules, opinions, orders, records, and proceedings.
552a. Records about individuals.
552b. Open meetings.
553. Rule making.
554. Adjudications.
555. Ancillary matters.
556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions record.
558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
559. Effect on other laws; effect of subsequent statute.

* * * * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated

after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by a order published in the Federal Register that the publication would be unnecessary and impracticable in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy interpretation or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

[(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonable describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.]

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by a requester who is a United States person for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to the requester.

(B) The time limits prescribed in subparagraph (A) of paragraph (6) shall be tolled whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought. Nothing in this subparagraph shall be construed to bar (i) a request for any records which are not related to the subject matter of such pending proceeding, or (ii) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.

(C) The Attorney General, in accordance with public rulemaking procedures set forth in section 553 of this title, may by regulation prescribe such limitations or conditions on the extent to which and on the circumstances or manner in which records requested under this paragraph or under section 552a of this title shall be made available to requesters who are persons imprisoned under sentence for a felony under Federal or State law or who are reasonably believed to be requesting records on behalf of such persons, as he finds to be (i) appropriate in the interests of law enforcement, or foreign relations or national defense, or of the efficient administration of this section, and (ii) not in derogation of the public information purposes of this section.

[(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comments, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.]

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedules shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. Such regulations—

(a) shall provide for the payment of all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request. The term "processing" does not include services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request, but does include services involved in examining records for possible withholding or deletions to carry out determinations of law or policy. Such regulations may also provide for standardized charges for categories of requests having similar processing costs,

(b) shall provide that no fee is to be charged by any agency with respect to any request or series of related requests whenever the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee, and

(c) in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or procured by the Government at substantial cost to the public, is likely to be used for a commercial purpose, and will deprive the Government of its commercial value, may provide for the charging of a fair value fee or royalties, or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the technological information, its costs to the Government, and any public interest in encouraging its utilization.

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(ii) With respect to search and duplication charges, documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public and not the commercial or other private interests of the requester. With respect to all other charges, documents shall be furnished without such charges where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational, or noncommercial scientific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media; or (c) a nonprofit group that intends to make the information available to the general public.

(iii) One-half of the fees collected under this section shall be retained by the collecting agency to offset the costs of complying with this section. The remaining fees collected under this section shall be remitted to the Treasury's general fund as miscellaneous receipts, except that any agency determined upon an investigation and report by the General Accounting Office or the Office of Management and Budget not to have been in substantial compliance with the applicable time limits of paragraph (6) of this subsection shall not thereafter retain any such fees until determined by the agency making such finding to be in substantial compliance.

[(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.]

(B) On complaint filed by a requester within one hundred and eighty days from the date of final agency action or by a submitter after a fina' decision to disclose submitted information but prior to its release, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction—

(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the requester;

(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under paragraph (7)(A)(ii) or which would have been objected to had notice been given as required by paragraph (7)(A)(I); or

(iii) to enjoin the agency from failing to perform its duties under sections (a) (1) and (2).

(C) In an action based on a complaint—

(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action.

(D) The agency that is the subject of the complaint shall promptly, upon service of a complaint—

(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

(E) In any case to enjoin the withholding or the disclosure of records, or the failure to comply with subsection (a) (1) or (2), the court shall determine the matter de novo. The court may examine the contents of requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action to withhold information and the burden is on any submitter seeking the withholding of information.

[(C)] *(F)* Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint's made, unless the court otherwise directs for good cause shown.

[(D)] *(G)* Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

[(E)] *(H)* The court may assess against the United States *or any submitter who is a party to the litigation* reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the [complainant] *requester* has substantially prevailed.

[(F)] *(I)* Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acting arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warrented against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency con-

cerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

[(G)] *(J)* In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

[(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

[(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

[(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

[(B) in unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

[(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

[(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

[(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

[(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the

agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.]

(6)(A) Except as otherwise provided in this paragraph, each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten working days after the receipt of any such request whether to comply with such request and shall immediately notify the requester of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty working days after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as defined in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in extensions of more than an aggregate of thirty working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

(iii) the need for consultation, which shall be conducted with all practical speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein;

(iv) a request which the head of the agency has specifically stated in writing cannot be processed within the time limits stated in paragraph (6)(A) without significantly obstructing or impairing the timely performance of a statutory agency function;

(v) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters; or

(vi) an unusually large volume of requests or appeals at an agency, creating a substantial backlog.

(C) Any requester shall be deemed to have exhausted his administration remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. An agency shall not be considered to have violated the otherwise applicable time limits until a court rules on the issue.

(D) Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the requester, subject to the provisions of paragraph (7). Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(E) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records shall be given expedited access.

(7)(A) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

(i) a submitter may be required to designate, at the time it submits or provides to the agency or thereafter, any information consisting of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4);

(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter, within ten working days after the receipt of such request, and shall describe the nature and scope of the request and advise the submitter of his right to submit written objections in response to the request;

(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure, specifying all grounds upon which it is contended that the information should not be disclosed; and

(iv) the agency shall notify the submitter of any final decision regarding the release of such information.

(B) An agency is not required to notify a submitter pursuant to subparagraph (A) if—

(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to subparagraph (A)(i), if such designation is required by the agency;

(ii) the agency determines, prior to giving such notice, that the request should be denied;

(iii) the disclosure is required by law (other than this section) and the agency notified the submitter of the disclosure requirement prior to the submission of the information;

(iv) the information lawfully has been published or otherwise made available to the public; or

(v) the agency is a criminal law enforcement agency that acquired the information in the course of a lawful investigation of possible violations of criminal law.

(C) Whenever an agency notifies a submitter of the receipt of a request pursuant to subparagraph (A), the agency shall notify the requester that the request is subject to the provisions of this paragraph and that notice of the request is being given to a submitter. Whenever an agency notifies a submitter of final decision pursuant to subparagraph (A), the agency shall at the same time notify the requester of such final decision.

(D) Whenever a submitter has filed objections to disclosure of information pursuant to subparagraph (A)(iii), the agency shall not disclose any such information for ten working days after notice of the final decision to release the requested information has been forwarded to the submitter.

(E) The agency's disposition of the request and the submitter's objections shall be subject to judicial review pursuant to paragraph (4) of this subsection. If a requester files a complaint under this section, the administrative remedies of a submitter of information contained in the requested records shall be deemed to have been exhausted.

(F) Nothing in this paragraph shall be construed to be in derogation of any other rights established by law protecting the confidentiality of private information.

(8) In any instance in which a portion of the records requested under this subsection consists of newspaper clippings, magazine articles, or any other item which is a public record or otherwise available in public records, the agency may offer the requester a choice of (A) furnishing the requester with an index identifying such clippings, articles, or other items by date and source, provided that such index is already in existence, or (B) notwithstanding the waiver requirements contained in this section, furnishing the requester with copies of such clippings, articles, or other items at the reasonable standard charge for duplication established in the agency's fee schedule.

(9) Nothing in this section shall be deemed applicable in anyway to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.

[(b) This section does not apply to matters that are—]

(b) The compulsory disclosure requirements of this section do not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency[;], *including such materials as (A) manuals and instructions to investigators, inspectors, auditors, or negotiators, to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investi-*

gations, inspections, audits, or negotiations, and (B) examination material used solely to determine individual qualifications for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

[(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;**]**

(6) records or information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy;

[(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;**]**

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if

such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any natural person;

(8) contained or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(10) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license under Federal export laws, unless regulation promulgated under such laws authorize the export of such data without restriction to any person and any destination; or

(11) records or information maintained or originated by the Secret Service in connection with its protective functions to the extent that the production of such records or information could reasonably be expected to adversely affect the Service's ability to perform its protective functions.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. *In determining which portions are reasonably segregable in the case of records containing material covered by paragraphs (1) or (7) of this subsection, the agency may consider whether the disclosure of particular information would, in the context of other information available to the requester, cause the harm specified in such paragraph.*

(c) Nothing in this section shall be deemed applicable to documents compiled in any lawful investigation of organized crime, designated by the Attorney General for the purposes of this subsection and conducted by a criminal law enforcement authority for law enforcement purposes, if the requested document was first generated or acquired by such law enforcement authority within five years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years. Notwithstanding any other provision of law, no document described in the preceding sentence may be destroyed or otherwise disposed of until the document is available for disclosure in accordance with subsections (a) and (b) of this section for a period of not less than ten years.

[(c)**]** *(d)* This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

[(d)**]** *(e)* On or before **[**March**]** *December* 1 of each calendar year, each agency shall submit a report covering the preceding **[**calendar**]** *fiscal* year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determinations;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)[(F)]*(I)*, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before [March] *December* 1 of each calendar year which shall include for the prior [calendar] *fiscal* year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4) [(E), (F), and (G)] *(H), (I), and (J)*. Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

[(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.]

(f) For purposes of this section—

(1) "agency" means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

(2) "submitter" means any person who has submitted to an agency (other than an intelligence agency), or provided an agency access to, trade secrets, or commercial, research, or financial information (other than personal financial information) in which the person has a commercial or proprietary interest;

(3) "requester" means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);

(4) "United States person" means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully for permanent residence, or a

corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

(5) "working days" means every day excluding Saturdays, Sundays, and Federal legal holidays; and

(6) "organized crime" means those structures and disciplined associations of individuals or of groups of individuals who are associated for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while generally seeking to protect and promote their activities through a pattern of graft or corruption, and whose associations generally exhibits the following characteristics:

(A) their illegal activities are conspiratorial,

(B) in at least part of their activities, they commit acts of violence or other acts which are likely to intimidate,

(C) they conduct their activities in a methodical or systematic and in a secret fashion,

(D) they insulate their leadership from direct involvement in illegal activities by their organizational structure,

(E) they attempt to gain influence in government, politics, and commerce through corruption, graft, and illegitimate means, and

(F) they engage in patently illegal enterprises such as delaying in drugs, gambling, loansharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.

(g) Within two hundred and seventy days of the date of the enactment of this subsection, any agency which relies or intends to rely on any statute which was enacted prior to the date of enactment of this subsection, or during the thirty-day period after such date to withhold information under subsection (b)(3) of this section, shall cause to be published in the Federal Register a list of all such statutes and a description of the scope of the information covered. The Justice Department shall also publish a final compilation of all such listings in the Federal Register upon the completion of the two-hundred-and-seventy-day period described in the preceding sentence. No agency may rely, after two hundred and seventy days after the date of enactment of this subsection, on any such statute not listed in denying a request. Nothing in this subsection shall affect existing rights of any party other than an agency.

§ 560. Technical Data Procedures

Each Federal agency maintaining technical data exempt under subsection (b)(10) of section 552 of this title shall promulgate regulations establishing registration (including certification) procedures and criteria under which qualified United States individuals and business concerns may obtain copies of such Government-owned technical data for purposes of bidding on Government contracts. No data under such procedures may be redisseminated or exported except as provided by law.

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